

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 17, 1997

TO: Ronald M. Sharp, Regional Director, Region 18

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: IES Utilities, Inc., Case 18-CA-14508

530-6067-6067-3400, 530-6067-6067-5200, 530-6067-6067-5283, 530-6067-6067-6033, 530-6067-6067-6067, 530-6067-6067-6400, 530-6067-6067-7100

This Section 8(a)(5) and (1) case was submitted for advice as to whether the Employer unlawfully refused to provide the Union with copies of investigative notes generated by supervisors during their investigation of a report of sexual harassment.

FACTS

IES Utilities, Inc. (Employer) is a public utility engaged in the distribution of gas and electric energy from its principal places of business located across the State of Iowa. Operating Engineers Local 275 (Union) represents the Employer's employees at the Sixth Street generating station.

The Employer has a published Equal Employment Opportunity/No Harassment Policy. This policy is circulated to employees annually. The policy provides that complaints of unlawful harassment will be investigated "in the most confidential manner feasible given the circumstances." After receiving a sexual harassment complaint at its Sixth Street generating station, the Employer conducted an investigation. As part of this investigation, two supervisors of the Employer interviewed witnesses. The Employer asked Union representatives to be present at these meetings if the interviewee was a unit employee and requested representation.

The Employer interviewed about 28 employees, about half of whom were current unit employees. Only three of the approximately 14 unit employees asked for Union representation, and Union representatives were only allowed to attend their interviews. One of the Union representatives was also interviewed by the Employer, but represented himself. The Union representatives were not allowed to ask questions during the interviews. The Employer allowed the Union representatives to take notes during the interviews, but they chose not to do so. There is no contention that any bargaining unit employee was denied representation during these interviews.

The Employer's representatives took notes during the interviews. The notes were summaries rather than verbatim accounts of what the witnesses said. When the witnesses stated a particularly important fact, the supervisors quoted the witness' exact words. The employees were not allowed to review or verify the accuracy of the notes.

The Employer assured the witnesses that the information they gave would be kept as confidential as possible consistent with a thorough investigation. The Employer also instructed the witnesses not to discuss the investigation with others, including their fellow employees and neighbors.

Based upon the results of its investigation, on August 30, 1996, the Employer discharged one male employee and suspended two other male employees for alleged sexual harassment of a female employee. All of these individuals worked at the Employer's Sixth Street generating station and were members of the bargaining unit. The Union filed timely grievances on behalf of all three of these employees. These three grievances are currently pending arbitration.

The Union retained legal counsel to handle these grievances. The Union's attorney investigated these grievances, interviewing the grievants and talking to six other employees suggested by the Union. On September 6, 1996, the Union requested copies of

the Employer's investigative material, including any statements or notes regarding interviews or other investigation. The Union gave written assurances that the information would be used only for the purpose of assessing and responding to the grievances pursued by its members. The Union also stated that only officials of the Union and its attorneys would have access to the information.

On October 24, 1996, the Employer supplied the Union with a summary of the allegations made against each of the three grievants along with information obtained from witnesses relating to each of the allegations. The Employer told the Union that it was providing a summary in order to protect the confidentiality of the witnesses who participated in the Employer's investigation. However, the Union claims that the summaries provided by the Employer contained numerous inaccuracies: (1) the Union heard witnesses testify that they had not witnessed the conduct suggested by the interviewers and these denials were not mentioned in the summaries; ⁽¹⁾ (2) witnesses brought up the accuser's shady and obscene past and these observations were not in the summary; ⁽²⁾ (3) the Union's attorney stated that the witnesses told him that the Sixth Street Station had a prevailing problem of numerous employees using foul language and language with sexual overtones, yet this was never mentioned in the summary; (4) the Union attorney complains that witnesses told him they thought the accused employees were being made "scapegoats," but this was never stated in the summary; (5) none of the witnesses the Union attorney talked to saw anything close to the type of incidents described in the summary; (6) the Union attorney contends that witnesses told him about a "blow up" the victim had with her new supervisor which immediately preceded her complaint of sexual harassment, but this incident was not reflected in the summary.

On December 6, 1996, the Union specifically requested copies of the interview notes taken by the Employer's supervisors with the names of the witnesses redacted. The Employer responded that it had given the witnesses assurances of confidentiality and that one of the witnesses requested that the information remain confidential. The Employer stated that, even with the names redacted, the notes contained information unrelated to the grievances that would enable a reader to identify the witnesses. ⁽³⁾

On April 16, 1997, the Union offered an "attorneys eyes only" stipulation ⁽⁴⁾ with the further condition that the arbitrator would provide for the sequestration of witnesses to preserve confidentiality. The Employer refused on the grounds that it was not obligated to provide the Union with the confidential investigative notes. The Employer has provided all other information requested by the Union. The Union did not specifically request, nor was it given, the names of the individuals interviewed by the Employer. The Union admits that during its own investigation it was able to determine which bargaining unit members were interviewed.

The arbitration proceeding was originally scheduled for August 18, 1997. The Union obtained a subpoena for the notes from the arbitrator, but the Employer has refused to turn over the notes in compliance with that subpoena. The arbitration was postponed and the Union indicated that it will not seek enforcement of the subpoena until after a decision is made in the instant case.

The Employer stated that, during the arbitration, it will not call any of the witnesses interviewed in the course of its investigation of the sexual harassment complaint. The Employer indicated that it will only call the two supervisors, who conducted the interviews, to testify concerning the results of their investigation.

ACTION

We conclude that the Section 8(a)(5) and (1) charge should be dismissed, absent withdrawal, in that the Employer had a legitimate and substantial confidentiality interest in refusing to provide the requested interview notes, and otherwise lawfully attempted to accommodate the Union by providing summaries of the witnesses' testimony.

A party engaged in collective bargaining generally has a statutory obligation to provide, upon request, information which is relevant for the purpose of contract negotiations or the administration of a collective-bargaining agreement. ⁽⁵⁾ The standard for relevance is a "liberal discovery-type standard." ⁽⁶⁾ Information which concerns the terms and conditions of employment of bargaining unit employees is deemed "so intrinsic to the core of the employer-employee relationship" as to be presumptively relevant. ⁽⁷⁾ This obligation extends to information requested and required by a union to process grievances on behalf of the

employees it represents. ⁽⁸⁾

The Board's inquiry does not end with a finding of relevance, however. The U.S. Supreme Court has "recognized a limited exception [to the duty to provide relevant information] for information that is confidential in nature." ⁽⁹⁾ Under Detroit Edison, where the respondent has raised a "legitimate and substantial" claim of confidentiality, "the Board is...required to balance the...need for the information against the legitimate confidentiality interest...." ⁽¹⁰⁾

For example, in Pennsylvania Power and Light Co., ⁽¹¹⁾ the Board upheld the employer's refusal to disclose the identities of confidential informants who uncovered certain employees using drugs. ⁽¹²⁾ The Board cited Anheuser-Busch ⁽¹³⁾

for the proposition that the union was not entitled to the drug informants' exact statements. The Board then required the employer to furnish a "carefully drafted summary of the informants' statements," from which the informants could not be identified. ⁽¹⁴⁾

Applying the Detroit Edison test to the facts of this case, we initially conclude that the Employer's investigative notes are relevant to the Union's processing of the three grievances. The investigative notes contain facts directly related to the sexual harassment complaint that provided the basis for the discipline of the three grievants.

We further conclude that the Employer raised a legitimate and substantial confidentiality interest in refusing to provide the investigative notes. This case is similar to cases where the Board, in seeking to protect the identity of a witness, held that a summary of the witness' testimony constituted a sufficient accommodation under Detroit Edison. ⁽¹⁵⁾

Finally, we conclude that the Employer has met its obligation of offering the Union a reasonable good faith accommodation, under Detroit Edison, by offering the Union the summaries of the investigative notes. In this regard, we note that the summaries provide the Union with the essential facts concerning the sexual harassment allegations while protecting the identity of the witnesses.

The Union has alleged that the Employer is obligated to provide the notes with the names of the witnesses redacted and that this accommodation would adequately protect the identity of the witnesses. However, the Employer asserts that there is other information in the investigative notes that would identify the witnesses other than their names. The Union apparently acknowledges that there is other identifying information in the notes, because the Union subsequently offered the "attorneys eyes only" compromise. ⁽¹⁶⁾ Since the investigative notes, with only the names of the witnesses redacted, will not protect their identity, we conclude that the Employer need not turn over the notes in this form.

Finally the Union contends that the Employer's summaries of the investigative notes are not a reasonable good faith accommodation, because they are inaccurate and incomplete in the following respects: (1) the Union heard witnesses testify that they had not witnessed the conduct suggested by the interviewers and these denials were not mentioned in the summaries; (2) witnesses brought up the accuser's shady and obscene past and these observations were not in the summary; (3) the Union's attorney stated that witnesses told him that the Sixth Street Station had a prevailing problem of numerous employees using foul language and language with sexual overtones, yet this was never brought out in the summary; (4) the Union attorney complains that witnesses told him they thought the grievants were being made "scapegoats," but this was never brought out in the summary; (5) none of the witnesses with whom the Union attorney spoke saw anything close to the type of incidents described in the summary; (6) the Union attorney contends that witnesses told him about a "blow up" the victim had with her new supervisor which immediately preceded her complaint of sexual harassment, but this incident was not reflected in the summary.

With respect to the above allegations by the Union, we conclude that the evidence adduced by the Union, through its own investigation, does not indicate that the summaries provided by the Employer were inaccurate or incomplete. In this regard, we note that the evidence gathered by the Union does not contradict the testimony of the witnesses interviewed by the Employer. Rather, the investigation conducted by the Union appears to concern matters not specifically addressed in the Employer's investigative interviews. At most, it addresses the weakness of the Employer's substantive position on the grievance.

Therefore, we conclude that the Union's allegation that the Employer's summaries are inaccurate and incomplete is without merit.⁽¹⁷⁾

Accordingly, since we conclude that the Employer has provided a reasonable good faith accommodation to the Union's request for the Employer's notes, the instant Section 8(a)(5) and (1) charge should be dismissed, absent withdrawal.

B.J.K.

¹ The denial appears to mean that they did not see anything, not that they were present during the alleged incident of sexual harassment and did not see anything happen.

² The investigators did not ask any questions about the accuser's past.

³ The Employer does not assert that non-disclosure is privileged because the notes are Anheuser-Busch witness statements, and the Region has determined they are not witness statements.

⁴ The "attorneys eyes only" stipulation provided that the notes would only be viewed by the arbitrator and the attorneys of the parties to the arbitration.

⁵ NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956); Howard University, 290 NLRB 1006, 1007 (1988).

⁶ Pfizer Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

⁷ Aerospace Corp., 314 NLRB 100, 103 (1994).

⁸ Wayne Memorial Hospital Assn., 322 NLRB 100, 102 (1996), and cases cited therein.

⁹ New Jersey Bell Telephone Co. v. NLRB, 720 F.2d 789, 791 (3d Cir. 1983), citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

¹⁰ General Dynamics Corp., 268 NLRB 1432, 1433 (1984) (footnote omitted).

¹¹ 301 NLRB 1104 (1991).

¹² Accord: Postal Service, 305 NLRB 997, 998 (1991) (Board held employer had no right to disclosure of identity of employees who had complained about use of force by postal inspectors against union stewards); Mobil Oil Corp., 303 NLRB 780, 781 (1991) (name of confidential informant regarding employee drug use need not be disclosed); but see Exxon Co., USA, 321 NLRB 896, 899 (1996) (applying Detroit Edison test to disclosure of identity of employees who volunteered that their compliance statements regarding drug/alcohol use were incorrect or whose compliance statements were audited, but ordering conditional disclosure pending negotiation of confidentiality agreement).

¹³ 237 NLRB 982 (1978).

¹⁴ 301 NLRB at 1107-08. See also New England Telephone Co., 309 NLRB 558 (1992) (employer to furnish summaries of witness statements relating to employee's disability); Mobil Oil Corp., supra (employer to provide summary of informant's testimony of employee drug use); Columbus Products Co., 259 NLRB 220 (1981).

¹⁵ Pennsylvania Power and Light Co., above; Associated Wholesale Grocers, Case 17-CA-17892, Advice Memorandum dated June 7, 1995.

¹⁶ Since the Employer, contrary to the Union contention discribed below, offered a reasonable good faith accommodation by providing the Union with the summaries of the witness statements, it is unnecessary to reach the issue of whether the Union's "attorneys eyes only" proposal is a "better" accommodation on which the Union could insist without bargaining over the Employer's proposal at all.

¹⁷ [FOIA Exemption 5